

No. 16141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE COLEMAN COMPANY, INC., a corporation,

Appellant,

vs.

HOLLY MANUFACTURING COMPANY, a corporation,

Appellee.

Petition of Appellant, The Coleman Company, Inc., for
Rehearing, for Rehearing En Banc, and in the
Alternative for Clarification of the Court's
Opinion.

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FILED

SEP 23 1959

PAUL P. O'BRIEN, CLERK



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Petition of Appellant, The Coleman Company, Inc., for Rehearing, for Rehearing En Banc, and in the Alternative for Clarification of the Court's Opinion.

Appellant hereby petitions the Court for a rehearing, and for a rehearing *en banc*, pursuant to the provisions of Rule 23.¹ In the alternative, appellant petitions the Court for clarification of its opinion. The required certificate of merits is filed separately, but a copy (and one duplicate original) is appended to these petitions.

The judgment appealed from, exclusive of interest, exceeds \$2,500,000 (\$2,508,642.73). Coleman submitted several contentions for the consideration of this Court, all

¹With respect to appellant's request for rehearing *en banc*, see, also 28 U. S. C. A. Sec. 46(c), and annotation in 97 L. Ed. at 1004-1007 following the reported case of *Western Corp v. Western P. R. Co.*, 345 U. S. 247, 97 L. Ed. 986.

in good faith and with honest conviction of their merit. The opinion of Judge Ross overlooks Coleman's principal contention entirely. Regarding Coleman's other contentions, the opinion suggests that, if not frivolous, they may nevertheless be summarily disposed of by reference to simple rules of *res judicata* and procedure. It can be demonstrated in these few pages that this is not so, and that Coleman's contentions have not been considered on their merits.

I.

The Unquestioned Mathematical Error in Computing the Amount of the Judgment Has Not Been Corrected.

In a judgment of this size, \$20,265.98 is relatively a pittance; but it is nevertheless more than is involved in the whole of many appeals. Coleman has shown that the judgment has been increased by that amount through sheer miscalculation (Op. Br. 76-77). Holly has not questioned that this is so. But the judgment has not been corrected.

II.

Coleman's Objections to the Basic Award of Nearly \$2,000,000 in General Damages Have Not Been Considered.

Coleman's appeal raises three separate and distinct issues:

(1) The propriety of the trial court's basic award of \$1,934,251.71 "general damages" for infringement (\$1,450,661.78 "lost profits" plus \$483,553.93 "to provide full compensation" therefor).

(2) The propriety of the interlocutory order finding Coleman guilty of contempt of the December 28, 1956,

writ of injunction, and the award of \$78,753.15 damages therefor (\$69,483.38 treble damages plus \$9,367.77 special attorneys' fees and expenses).

(3) The propriety of the award of \$492,665.45 exemplary damages (\$362,665.45 plus \$130,000.00 attorneys' fees) premised upon a finding of bad faith.

Of the approximately \$2,500,000 aggregate judgment below, nearly \$2,000,000 is represented by the basic award of general damages (plus \$3,008.42 court costs). And the major portion of Coleman's briefs to this Court was devoted exclusively to this single issue.²

Coleman's *chief* complaint is that there is *no* evidence to support the basic award of \$1,934,215.71 general damages, and that such award could have been made only by totally disregarding the 1946 amendment to the patent damage statute under which "the profits to be accounted for by the defendant" were removed as an element of damages, as such, and, in lieu thereof, it was enacted that the patentee may recover "general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor . . ." (60 Stat. 778).

Both in the trial court and in its briefs to this Court Holly insisted that:

"As a minimum, therefore, Holly would be entitled to recover Coleman's actual profit, \$1,186,537, *irrespective of whether Holly would have made the sales that Coleman made* if Coleman had not entered

²Points I (pp. 25-40), II (pp. 41-44), and V (pp. 77-87) of appellant's opening brief; parts 5, 6, 7 and 8 (pp. 19-42 of appellant's reply brief; and the entire appendix (26 pages) to appellant's reply brief—or some 115 pages in all—dealt solely with the basic issue of general damages.

the field. *An infringer's profits are a traditional measure of damages*" (see page 4, point 3, of this Court's opinion summarizing Holly's argument; our emphasis).

But it was urged in Coleman's briefs that under the 1946 statutory amendment, "The language [of the 1946 amendment] appears to make it plain that profits realized by the infringer are not recoverable as such" (*Ric-Wil Co. v. E. B. Kaiser Co.*, 179 F. 2d 401, 407, 7th Cir. 1950; and see *Faulkner v. Gibbs*, 199 F. 2d 635, 638, ftn. 5, 9th Cir. 1952)—unless under the facts of a given case plaintiff is able to demonstrate that but for the infringement he would in fact have made the infringer's sales (*Ric-Wil Co. v. E. B. Kaiser Co.*, *supra*, at 407).

In this connection, Coleman demonstrated that it is impossible to conclude that Holly would have made all, or substantially all, or even any appreciable part of Coleman's sales (Op. Br. 27-31). We believe this has been unanswerably shown. And the special master expressly so found [R. 52-53]. But it is certain that it sufficiently appears to merit and require this Court's careful consideration. Fluctuations in Holly's share of the national market before, during, and after infringement, as shown by its own evidence, supply laboratory proof of the false assumption underlying the enormous principal award. Holly did not even have coextensive market outlets with Coleman. It was unable to prove that it lost any sales at all, and was required by the facts of the situation to rely upon decisions *in which the patentee and the infringer controlled the entire market* and where, therefore, any sale by the latter must perforce have been supplied by the former but for the infringement. Upon the basis, solely, of these inapplicable decisions Holly argued in ef-

fect that the 1946 amendment introduced no change in the law.

With respect to this—the paramount issue on the appeal—this Court was asked to construe and apply the 1946 patent damage statute amendment. It was also asked, not to weigh evidence, but to decide whether there was *any* evidence to support the basic award of nearly \$2,000,-000 general damages—evidence to sustain the assumption that but for the infringement Holly would have made Coleman's sales, or evidence to sustain the assumption that had Holly made Coleman's sales it would have enjoyed a 19 per cent profit therefrom. *Yet the Court's opinion does not even mention the 1946 statutory amendment, and it contains no reference to any of the evidence on this primary issue.*

The opinion begins with the assertion that when infringement has been adjudged, "the question of damages for that infringement is *one of detail*" (p. 1; our emphasis). There follows a terse "statement of the case" (point 1, pp. 1-2), and a topical summary of the respective contentions of Coleman (point 2, pp. 2-4) and Holly (point 3, pp. 4-5). Ensuing points 4 through 8 (pp. 5-12) contain the Court's opinion in chief:

(a) Point 4 reviews the contempt decree which relates to merely \$182,851 *post-injunction sales* [Find. XXV, R. 431] out of the aggregate \$7,635,062 infringing sales upon which the basic award of general damages is predicated [Find. XIII, R. 426]. Whether or not these relatively few sales of chute-equipped heaters were properly held violative of the original injunction has no direct bearing upon the fundamental issue regarding the award of general damages for all \$7,635,062 infringing sales. And the Court's discussion under point 4 is confined to the ef-

fect of the chute, with no mention of the problems raised by the underlying damage controversy.

(b) Point 5 is devoted entirely to the proposition that validity and infringement are *res judicata*, something which does not reach the issue of what damages may properly be awarded for the adjudicated infringement.

(c) Point 6 returns to the contempt issue and discusses the award of \$78,753.15 *punitive* damages for *post-injunction sales*, with stress being placed upon Coleman's lack of good faith, all of which is irrelevant to the main issue of general damages for infringement.

(d) Point 7 is confined to a consideration of whether, with respect to the issue of good faith, Coleman could properly rely upon the advice of its patent counsel—a problem which again is not germane to the general damages issue.

(e) Finally, point 8 discusses the “visual evidence” (smoke tests) observed by the trial judge *during the contempt proceedings*, and states that this justified his disregarding the special master's finding that *with respect to pre-injunction sales* Coleman acted in good faith. Manifestly this does not even touch upon the general damage issue.

Not until the Court's summary “conclusion” (point 9) on the last page of its opinion is there any mention whatever of the evidence and statutory-decisional law bearing upon the \$2,000,000 general damage issue. And even there we find only this single sentence:

“There is substantial evidence to support the judgment of the Court below on the subject of damages for the already adjudicated infringement.”

Upon this most substantial and controlling issue which Coleman has submitted in good faith, upon an extraordinarily strong record, we submit Coleman is entitled to far more consideration than is afforded by the foregoing sentence. It is not even indicated upon what evidence the trial court was justified in assuming that Holly would have made all, or nearly all, or any substantial part, of Coleman's sales (when both its pre-infringement and post-infringement experience shows otherwise), or upon what evidence the trial court could properly conclude that had Holly done so it would have earned a 19 percent profit, so as to support an award of nearly \$2,000,000 in general damages. The conclusion is inescapable that this vital issue has been disposed of without any reference to the evidence upon the mistaken assumption that, notwithstanding the 1946 amendment, once infringement had been adjudicated Holly became entitled to recover all of Coleman's profits—or, even worse, to the profits Holly claimed it would have enjoyed had it made all of Coleman's sales—"irrespective of whether Holly would have made the sales that Coleman made if Coleman had not entered the field" (Opin. p. 4, summarizing Holly's contention).

Holly's brief and oral argument seemingly misled the Court as to the principal issue posed by the appeal since this all important, \$2,000,000 problem is not even discussed in the Court's opinion. If rehearing is not granted, we submit that at least the opinion should be clarified to indicate the basis upon which Coleman's contentions on the general damage issue are rejected.

III.

The Evidence on the Issue of Good Faith Has Not
Been Considered Because of the Erroneous As-
sumption That the Prior Judgment Settled It.

Judge Ross's conclusion that the evidence supports the finding of bad faith—accounting for nearly \$500,000 (\$492,665.45) of the award—is frankly based upon the original adjudication of infringement, including the former opinion of this Court, on the theory that the issue thereby became *res judicata*.³

Assuredly it may not be questioned that a judgment, or appellate decision, does not dispose of questions not then involved but which first arise thereafter (Op. Br. 67-70). The question of Coleman's good or bad faith was not involved at all in the original validity-infringement proceedings. The sole issues then tried were whether Holly's patent was valid, and, if so, whether it was infringed by Coleman's wall heaters. Undeniably the question of Coleman's good or bad faith was irrelevant to the *validity* issue. And it was no less irrelevant to the issue of *infringement*. This is so because good faith is no defense to the charge of infringement, a rudimentary principle which has been recognized since at least 1899—see *National Cash-Register Co. v. Leland*, 94 Fed. 501, 511 (1st Cir.):

“As with other infringers, it is immaterial whether the director knew or was ignorant that the article manufactured and sold did infringe a patent.”

³Actually, since the former and instant appeals involve *the same suit* the appropriate doctrine (assuming *arguendo*, its applicability) is “law of the case” rather than *res judicata* or collateral estoppel—see pages 67-70 of Coleman's original brief herein.

The *damage* issue was not reached at the original trial, being reserved for the subsequent accounting. By the same token, Coleman's good or bad faith became relevant for the first time at the accounting trial because, "The knowledge or intent of the infringer is immaterial, except as it affects the amount of damages recoverable [citations]" (*Callison v. Dean*, 70 F. 2d 55, 57, 10th Cir. 1934).

We readily concede that at the original validity-infringement hearing the trial judge found that Coleman had faithfully copied Holly's invention and that its infringement was intentional, conscious, and deliberate, which finding was affirmed by this Court's opinion on the former appeal. To one unmindful of the settled rule that judicial pronouncements are necessarily limited to the issues then before the court, this indeed might seem to represent an adjudication of bad faith. However, the finding of deliberate, intentional infringement is not tantamount to a finding of bad faith. With regard to this, the Court's opinion contains a quotation from the oral argument of Coleman's counsel which is said to have a double-talk flavor, possibly because of its fractured syntax. The thought attempted to be expressed, however, is a valid one, and no stranger to courts concerned with infringement problems: that deliberate intent to do a thing does not necessarily involve bad faith. It is not likely that anyone infringes a patent without deliberate action. But if the infringing structure is built and sold under a *bona fide* and not unarguably groundless belief that the patent is invalid or that the structure does not infringe, the "deliberate" infringer is not guilty of bad faith. This truism appears not previously to have been questioned in any of the numerous cases in which damages have been fixed after determination of infringement. It is recog-

nized by one perfectly parallel case cited in Coleman's opening brief (p. 70)—*Rockwood v. General Fire Extinguisher Co.*, 37 F. 2d 62 (2nd Cir. 1925). There, as here, the trial court's finding during the initial infringement trial that defendant "had copied the [plaintiff's] idea" and "succeeded in appropriating all that was of value in plaintiff's device" was affirmed on appeal. Upon the subsequent accounting trial, the court assessed punitive damages which, according to the present opinion in the suit at bar, would have been inevitably proper. But the penal award was there reversed on appeal, the court saying:

"The validity of the patent and its infringement was open to honest doubt, and it was not until this court passed upon the question that the defendants were found to infringe. In the absence of a deliberate purpose to infringe no such punitive damages should have been granted [citing cases]." (p. 66).

As hereinbefore demonstrated, prior to the accounting trial the court below (and, accordingly, this Court on the former appeal) could not have adjudicated that Coleman was guilty of good faith because until then good faith was neither a relevant nor a litigated issue. Therefore, if the finding of deliberate, intentional infringement made during the original trial (and affirmed on the former appeal) were intended as a pronouncement of bad faith it would necessarily have been dictum, not adjudication. In any event, however, the record establishes that *in fact* the good faith issue was not litigated at the original trial and that the trial judge did not construe his initial "deliberate" infringement finding as a finding of bad faith [R. 765, 1938-1939, 1996-2002].

In the foregoing connection, note that the trial court did not contradict but acquiesced in the assertion by Coleman's counsel, made during the course of argument at the end of the second accounting trial, that the good faith issue had not therefore been decided *notwithstanding the original finding of "intentional infringement"* [R. 1938-1940, particularly R. 1938]. And note that, at this same closing stage of the subsequent accounting proceedings, the trial court invited and Holly's counsel presented argument regarding the special master's finding of good faith [R. 1994]. All of this is utterly inconsistent with the premise that the trial court had, or thought it had, already adjudicated this issue at the former hearing.

Again, it will be noted that direct evidence pertaining to Coleman's motive was introduced for the first time at the accounting trial when Holly undertook affirmatively to demonstrate bad faith, primarily through the testimony of its surprise witness Dean Olds [R. 1310 *et seq.*]. Even in its current brief to this Court, Holly relies almost exclusively upon *evidence* adduced at the *accounting* trial to support the award of punitive damages and attorney's fees (Point XI, Br. 87-97). For example, in the 14 numbered paragraphs where Holly purports to outline the bases for the exemplary damage award (Br. 87-92), Holly stresses *evidence*—not adjudication—and refers almost entirely to *accounting* trial testimony.⁴ The

⁴Thus, Holly stresses evidence: (1) that Coleman found its wall heaters non competitive (Br. 87); (2) that Coleman's president directed its design engineer to proceed (Br. 87); (3) that Coleman requested but was refused a license from Holly (Br. 88); that Coleman's patent counsel was careless (Br. 88); (8) that Coleman was litigious (Br. 89); (9) that Coleman withheld records from the accounting hearing (Br. 89); (10) that Newton's testimony before the special master related to data used at the contempt

caption of this section of Holly's brief does not mention *res judicata*. Only incidentally, in point "4" of its 14 numbered arguments (Br. 88), does Holly even suggest that Coleman's bad faith, which Holly is there attempting to demonstrate, was already adjudicated. Even there Holly merely makes the bald assertion that this is so, citing one case—*Bristol Laboratories v. Schenley Laboratories, Inc.*, 117 Fed. Supp. 67 (S. D. Ind.)—which neither involved nor discussed *res judicata*.

We submit the good faith issue was not litigated or determined at the original infringement trial, and that Holly, Coleman, the special master, and the trial court all recognized this fact when the issue was tried, argued, and passed upon for the first time at the accounting hearing. We further submit that it could not legally have been adjudicated at the original trial since Coleman's motive had no bearing upon the issues of validity and infringement which alone were then being tried. Accordingly, we submit the present opinion errs in holding Coleman is precluded from complaining of the huge award of exemplary damages upon the erroneous assumption that Coleman's bad faith was adjudicated before the issue became material or could have been litigated.

When for the first time Coleman's motives became relevant, namely, at the accounting trial, the evidence of-

hearing (Br. 90); (11) that "new" evidence urged by Coleman before the special master was really old evidence already introduced at the contempt trial (Br. 90); (12) that Coleman sought to retry the infringement issue before the special master (Br. 91); (13) that the record in the companion *Coleman v. Siegler* appeal was significant (Br. 91); and (14) that Coleman improperly relies upon claim 2 of its Giwosky patent (Br. 91). *Not one of these factors was before the trial court during the first infringement trial nor before this Court on the former appeal, and they are all based upon testimony which was never introduced until after this Court's former opinion herein was rendered.*

ferred by both sides showed conclusively that Coleman acted in the bona fide belief that it did not infringe. One cannot read the contemporaneous writings of Holly's witness Olds, Coleman's former design engineer, without recognizing this fact (Op. Br. 55-61). The issue of good or bad faith cannot possibly be decided without reference to the Olds testimony; but it is not mentioned in the opinion. Instead, the opinion stresses only the testimony of Coleman's patent counsel (point "7", p. 11) which of course may be entirely disregarded without satisfying Holly's burden of proving bad faith.

The only other evidence mentioned in the opinion is the "visual evidence" observed by the trial court *during the contempt proceedings* (point "8", p. 12). This, the opinion states, eviscerates Coleman's complaint that the trial court found Coleman guilty of bad faith upon "the same evidence" which persuaded the special master to find that Coleman had acted in complete good faith. However, this visual evidence was merely a demonstration via colored smoke tests of the amount of infringing air which was utilized in Coleman's economizer. This *physical* evidence was germane to the question of whether or not Coleman's chute-equipped economizers infringed Holly's patent and therefore violated the original injunction. It manifestly has no relevance whatever to the issue of good faith. Whether Coleman acted in good or in bad faith could have had no possible effect upon the amount of pink air which, during the visual tests, the trial court observed in Coleman's economizer. Furthermore, these tests were conducted during the *contempt* hearing, and the trial judge himself made it clear that good faith was not at issue then since "absence of wilfulness does not relieve from civil contempt" [R. 765; and see R. 1939].

Finally, the special master expressly refrained from passing upon Coleman's good faith with respect to sales made by Coleman *after* the original injunction was issued [Find. XXIV, R. 67]. Instead, the special master found, upon evidence relating to the pre-injunction period when all but \$182,851 of the aggregate \$7,635,062 infringing sales were made, that from the outset *until the injunction was originally issued* Coleman had acted in good faith. We therefore submit that the trial court's refusal to accept the special master's good faith finding "up to the date of the issuance of the injunction" [Find. XXIII, R. 67] may not be explained or condoned by reason of "visual evidence" *subsequently* introduced *during the contempt hearing*, and *a fortiori* so because the visual demonstrations of "pink air" have no logical bearing upon the good faith question.

IV.

Coleman's Principal Arguments on the Appeal From the Contempt Decree Have Not Been Considered.

Coleman has submitted a proposition which it deems platitudinously simple: its modified heater could not constitute contempt of the original injunction unless it infringed Holly's patent (Op. Br. 71-77). The trial judge himself acknowledged this fact when, during the contempt hearing, he volunteered the statement: "The burden is upon the plaintiff to prove, by a preponderance of the evidence, its contentions as to the infringement" [R. 764].

Holly, having this burden, offered *no* evidence that Coleman's heater, with chute, infringed. This Court is not asked to weigh *conflicting* evidence. There was, simply, *no* evidence that Coleman's modified heater infringed.

The sole testimony germane to this issue was the "visual evidence" [R. 766] quoted at page 12 of this Court's

opinion. This evidence demonstrated that the chute reduced by two-thirds the pink or infringing air in Coleman's economizer, so that, *under the trial court's own computation*, the modified heater (with chute attached) utilized *only two-thirds* of 14 percent or but 4.666% of pink air [R. 766]. *There was no testimony, however—*by visual demonstration, verbal testimony of expert witnesses, or otherwise—*that this small amount of air materially affected the efficiency of the modified heater.* Yet Holly's own counsel conceded during the contempt hearing that unless the amount of pink air entering Coleman's modified heater was sufficient to affect its efficiency, the rule *de minimis* would apply and the heater could not be held to infringe (or, perforce, to violate the injunction)—[see R. 710].

With no testimony to sustain its conclusion, the trial court simply announced—and this Court has accepted—the *non sequitur* that since the original quantity of pink or infringing air (14%) affected the efficiency of Coleman's original heaters, *ergo* one-third of that quantity must similarly have affected the efficiency of Coleman's modified heaters. Obviously it does not follow from the fact that a given quantity of a substance is a lethal dose that one-third of that quantity must also be. Nor can this fatal deficiency in Holly's proof be circumvented by characterizing as "an ineffective small piece of metal" and as a "gadget" a chute which undeniably reduced *by two-thirds* the quantity of pink air which had originally been adjudged to infringe. If this Court has found *any* evidence anywhere in the record that Coleman's *modified* heater infringed—that the mere 4.666% of pink air not excluded by its chute affected its efficiency in the least—we submit attention should be called thereto

in the opinion so that Coleman may know that this \$78,753.15 issue has been decided upon its merits.

Coleman's remaining contention on this issue is that *a motion for contempt is not a proper remedy* when there is fair ground of doubt as to infringement by the modified device, or as to the wrongfulness of the defendant's conduct (Op. Br. 74-75). We assume the Court did not conclude that the original decree of infringement also deprived Coleman of its right to defend its *modified* heater which had not come into existence until after the former appeal. And since Holly introduced no evidence tending to show that Coleman's modified heater utilized sufficient pink air to affect its efficiency, there was, to say the least, doubt whether the modified heater infringed. Therefore, the motion for contempt was not the proper procedure. The opinion does not even refer to this important contention.

V.

Coleman Has Not Attempted to Retry the Issues of Validity or Infringement.

Judge Ross insists that Coleman has attempted to retry the "two points" of validity and infringement (Opin. p. 6). Yet not one word in Coleman's briefs mentions or even bears upon the *validity* issue. Nor does the opinion suggest in what respect Coleman has sought to reargue the validity of Holly's patent. As for the *infringement* issue, the new evidence which Coleman stresses is clearly relevant with respect to the issues of damages and good faith; and it is with respect only to these new issues that the evidence has been urged upon the Court's consideration.

In this connection, although eventually Holly argued that Coleman was attempting to reopen the infringement issue,⁵ it made no objection when evidence of the true amount of infringing air in Coleman's economizers was offered and received [Harmon, R. 529-559; Newton, R. 598-645]. Nor did it occur to the trial court that Coleman sought to relitigate the infringement issue, else the newly proffered evidence would have been rejected on this ground. Instead, this evidence was accepted by the trial court in an enormous down grading of the volume of infringing air previously found to exist [R. 734, 766, 1865] (Reply Br. 7-8).

Coleman's briefs have been reread to determine wherein they created Judge Ross's impression that retrial of the infringement issue was sought. No argument has been found in which Coleman contradicts any of the former evidence except in respects in which it bore directly upon issues which were before the Court for the first time, namely, the value of the use made of Holly's patent by Coleman (damages), and whether or not Coleman acted in good faith (punitive damages).

We submit the caustic criticism of Coleman, or, more accurately, of Coleman's counsel, in point "5" of the Court's opinion is not merited—as is all but conceded by the final two paragraphs on page 8.

Conclusion.

The opinion fails to consider, upon their merits, the substantial points upon which this appeal was taken. In particular, there is no explanation as to why or in what

⁵Even Holly has never suggested that Coleman at any time during the accounting trial or the instant appeal attempted to reargue the patent *validity* issue.

respects the evidence is sufficient to sustain an award of nearly \$2,000,000 in general damages, the opinion seeming to indicate that this primary problem is not in controversy and that the appeal relates solely to secondary issues of exemplary damages and damages for contempt. Assuredly Coleman is entitled to know whether the 1946 patent damage statute amendment has been considered by the Court, and, if so, why it is not determinative. Even if rehearing were denied, at least the opinion should be clarified to reveal the basis upon which the \$2,000,000 general damage award has been sustained.

We submit, too, that the existing opinion is defective in the other respects hereinbefore discussed—including its failure to correct the undenied \$20,265.98 mathematical error in the judgment computation.

It is respectfully requested that a rehearing be granted, and, because of the importance of the issues both to the instant litigants and also to the patent bar generally, that such rehearing be held *en banc*. In the alternative, it is requested that the opinion be clarified.

Respectfully submitted,

PARKER, STANBURY, REESE & MCGEE,

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APPENDIX A.

Certificate of Counsel

(Rule 23).

Raymond G. Stanbury, being first duly sworn, states that he is one of the attorneys for the defendant-appellant The Coleman Company, that the Petition for Rehearing, for Rehearing En Banc, and in the alternative for Clarification of the Court's opinion, is in his judgment well founded, and the same is not interposed for delay.

RAYMOND G. STANBURY

Subscribed and sworn to before me this 21st day of September, 1959.

MARY O. TERPENNING,
*Notary Public in and for Los Angeles County,
State of California.*

My commission expires April 29, 1960.

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